IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT OF CENTRAL CONTRACTING & MARINE, INC. FOR EXONERATION FROM, OR LIMITATION OF, LIABILITY.	))))	Cause No: 4:15-CV-01111

PLAINTIFF'S EMERGENCY MOTION FOR AN ORDER
PERMITTING ENTRY ONTO PROPERTY IN ACCORDANCE WITH RULE 34

Comes now Plaintiff Central Contracting & Marine, Inc. ("Central Contracting") and moves for entry of an order permitting entry onto property owned or controlled by Third-Party Defendants, for purposes of inspection, photographing, surveying, and/or measuring, prior to commencement of repairs. In support, Central Contracting states:

1. Plaintiff filed this lawsuit under the laws of the United States providing for limitation of vessel owners' liability, 46 U.S.C. §§ 30501-30512, and the various statutes, rules, and regulations relating thereto.

2. This limitation action arises out of an allision which occurred when equipment on the top of Plaintiff's vessel, the M/V DANNY BRADFORD, contacted scaffolding which was protruding below the bottom of the Eads Bridge's center arch and which was partially obstructing the space reserved for vessel navigation.

3. It has been reported that at or shortly after the time of the allision, James Pigue, a worker performing sandblasting work inside the scaffolding on the Eads Bridge, fell from the scaffolding and died. It has also been reported that certain scaffolding and other equipment on the bridge that was part of a bridge rehabilitation project was damaged.

4. In addition to its complaint under the Limitation Act, Plaintiff filed a Third Party Complaint against Thomas Industrial Coatings, Inc. ("Thomas"), the Bi-State Development

Agency of the Missouri-Illinois Metropolitan District ("Metro"), and St. Louis Bridge Construction Company ("Bridge"). In this Third Party Complaint, Plaintiff alleged that Metro, Bridge, and Thomas caused or contributed to Mr. Pigue's death and any damage caused by the allision by their negligence in, among other things, unlawfully and unreasonably obstructing the navigable channel of the Mississippi River by erecting scaffolding that altered the clearance of the Eads Bridge.

5. Beginning on July 22, 2015, the undersigned counsel for Plaintiff has communicated with counsel for all three Third-Party Defendants in order to arrange a physical examination of the site of the allision before repairs to the site begin. See communications attached as Exhibit A. However, as of today, August 14, 2015, undersigned counsel has been unable to get consent to proceed with the inspection.

6. Also on today, August 14, 2015, counsel for Thomas communicated to Plaintiff's counsel that, before Plaintiff will be permitted to inspect the site, the Third-Party Defendants will require "an agreed order" meeting six requirements. See August 14, 2015 letter from counsel for Thomas, attached to this Motion as Exhibit B. These requirements include language "Covering release of liability and indemnification and payment of all costs associated with the safety and access requirements." Exhibit B.

7. In the same letter announcing the Third-Party Defendants' six requirements for site access, counsel for Thomas informed Plaintiff's counsel that repairs to the site are set to commence on August 24, 2015.

8. The undersigned counsel for Plaintiff files this Motion because, in accordance with Local Rule 37 – 3.04, the undersigned counsel for Plaintiff has conferred in good faith with counsel for Third-Party Defendants but, after sincere efforts to resolve this dispute, counsel are

unable to reach an accord. The undersigned counsel styles this Motion an "Emergency Motion" because of the imminent repairs (of which Plaintiff's counsel was only informed of on August 14, 2015) which will alter the site from its post-accident state.

9. Inspection of the accident site is critical in this case because it appears the physical characteristics of the job site had a direct role in causing or contributing to Mr. Pigue's death. Among other things, it appears the scaffolding in question was installed so that it hung below the bridge superstructure in a manner so as to impede river navigation. There are also questions concerning whether Mr. Pigue was equipped with necessary fall protection. Finally, Plaintiff anticipates a property damage claim relating to the scaffolding and equipment and Plaintiff should have the right to an inspection of the alleged damage by a competent surveyor prior to commencement of repairs.

10. The Federal Rules of Civil Procedure permit "entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it." Fed. R. Civ. Pro. 34(a)(2).

11. The owner of property subject to a Rule 34 site investigation is not permitted to require indemnification or waiver of liability as a condition to its compliance with the Federal Rules of Civil Procedure. *Hindle v. National Bulk Carriers*, 18 F.R.D. 198, 199 (S.D. N.Y. 1955) ("[The owner of property subject to a Rule 34 site investigation], by permitting access, is not doing a favor and is in no position to stipulate that, in the event of accident, it shall receive treatment more favorable than that to which it would be entitled by law.").

12. Although undersigned counsel appreciates that there may be safety concerns relative to certain aspects of the inspection, as there would be with access to almost any accident

scene, it appears that the various safety conditions required by Third-Party Defendants are unduly onerous, and probably could not be satisfied by the date repairs are scheduled to commence. It should be noted that Plaintiff has indicated its intent that the site inspection be conducted by a professional marine surveyor who, by the nature of his profession, is frequently called upon to gain access to areas involving fall risks, confined spaces, and work on or around water.

13. Where, as here, an informal request is made under Rule 34, a motion to compel may properly be pursued without the moving party first having served a formal Rule 34 request. See, e.g., *Dixon v. Cappellini*, 88 F.R.D. 1 (M.D. Pa. 1980) (Motion to compel is proper where communications between counsel illustrate that "the spirit, if not the procedure of Rule 34, was followed.").

WHEREFORE, Central Contracting & Marine, Inc. prays for entry of an order compelling Third-Party Defendants to permit entry onto the designated property, for purposes of inspection, photographing, surveying, and/or measuring, before repairs commence and without the entry of "an agreed order" "[c]overing release of liability and indemnification."

Respectfully Submitted,

GOLDSTEIN and PRICE, L.C.
and Douglas E. Gossow (MO #35525)
and Daryl Sohn (MO #24059)
and Elana L. Charles (MO #64775)

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CERTIFICATE OF SERVICE

I hereby certify that on August 14, 2015, the foregoing document was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system on all counsel of record. Service has also been affected via U.S. Mail, postage pre-paid, and e-mail to the following counsel for Bi-State Development Agency of the Missouri-Illinois Metropolitan District:

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_/s/ _Douglas E. Gossow______